

file



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Ivan and Patsy Fry, d/b/a Surewood
Forest Campground for an After-the-Fact Permit to
Authorize Piers on the Bed of Lake Alice, Town of
King, Lincoln County, Wisconsin

Case No. 3-NO-97-1075

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Pursuant to due notice hearing was held on August 25, 1998, Jeffrey D. Boldt,
administrative law judge (ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding
are certified as follows:

Ivan L. and Patsy Fry
W4211 Sandy Lane
Tomahawk, WI 54487

Wisconsin Department of Natural Resources, by

Michael D. Scott, Attorney
P. O. Box 7921
Madison, WI 53707-7921

Richard Morris, by

Brian J. Arndorfer, Attorney
Mallery & Zimmerman, S.C.
120 South Mill Street
Merrill, WI 54452

FINDINGS OF FACT

1. Ivan and Patsy Fry, d/b/a Surewood Forest Campground, W4211 Shady Lane,
Tomahawk, Wisconsin, 54487, applied to the Department of Natural Resources for an after-the-
fact permit to authorize piers that have been placed on the bed of Lake Alice, Town of King,

Lincoln County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in Government Lots 2 and 3 in Section 29, Township 35 North, Range 7 East, Town of King, Lincoln County. The above-described property abuts Lake Alice, which is navigable in fact at the project site.

3. The applicants propose to authorize by permit existing pier structures made available to campers at the Surewood Forest Campground (Surewood Forest). The shoreline at Surewood Forest is currently density packed with piers that serve long-term seasonal campers at the site. The upland at the project site is a high-density campground with approximately 100 campsites. Many campers are long-term summer users who have made a sizable investment in the permanent campers at the site. (Glocke) The applicant's parcel consists of about 27 acres and includes more than 900 feet of riparian frontage. (Bartz) The applicant currently placed 27 piers capable of mooring 59 boats.

4. The purpose is to provide mooring space and pontoon rental to campers at Surewood Forest. The Campground has done so for many years, although the number of boats moored has increased over the past 20 years.

5. The proposed structures will not materially obstruct existing navigation on Lake Alice and will not be detrimental to the public interest upon compliance with the conditions of the permit set forth below.

6. The proposed project exceeds the "reasonable use" of the riparian parcel owned by the applicant. Department staff make use of a guidance document which attempts to apply complex common law principles on a consistent, but site-specific, basis statewide. Riparian rights must be balanced against the rights of the public in protecting and preserving public waters. The riparian's use of its property must be reasonable. The guidance sets a presumption of reasonable use at two slips for the first fifty feet of riparian frontage and one additional slip for each additional fifty feet of shoreline frontage owned. (Ex. 49; Accord, *Sterlingworth*, at p. 731) The guidance allows the DNR staff flexibility based upon site-specific public interest factors.

Strictly applying the guidance to the project site, a "threshold" reasonable use of the property would involve placement of no more than 19 boat moorings at the site. (Bartz) Based upon the historic uses of the site, and assuming that some slips be made available to the public in the form of seasonal rentals, Bartz testified that 26 moorings would be a reasonable use of the riparian parcel. Bartz recommended that seven of the 26 slips be made available to the public for seasonal rental. The applicant, and the campground users, expressed a strong preference to maintain as many slips as possible exclusively for Surewood Forest users. There is no question that the campground has existed at the site for many years, and has allowed many families access to the public waters of Lake Alice who might otherwise not been able to afford to do so. Accordingly, the record supports allowing the applicant the following option: to moor a total of 26 slips, if they choose to make seven slips available to non-campers for seasonal rentals; or, in the alternative, to moor a total of 24 boats if all of the slips are reserved for campground users.

Bartz was persuasive that piers 15 through 28 have had the most significant detrimental impacts to the public waters in terms of contributing to upland erosion at the point, disturbing aquatic vegetation and creating navigational conflicts.

7. Lake Alice maintains a high-quality fishery, supporting walleye, northern pike, smallmouth and largemouth bass, bluegill and yellow perch, among other species. The gravel/sand substrate is particularly well-suited to spawning by the bluegill population. (Hauber) DNR Fisheries Biologist Alan Hauber testified that shading caused by piers and related boats can adversely impact the growth of macrophytes, which provide food and cover for fish at the project site. Hauber opined that he would have concerns about cumulative impacts to the public interest in maintaining a high quality fishery if the existing pier configuration were allowed. Hauber supported a limitation of the number of piers as suggested by Bartz.

8. The existing pier configuration has had a detrimental impact upon the public interest in maintaining a diverse plant community in public waters. DNR Water Resources Management Specialist, Laura Herman testified that she inspected the project site with other DNR staff on July 23, 1998. (Ex. 52) Herman concluded that the natural undisturbed areas on Lake Alice contained a more diverse and dense stand of aquatic vegetation than the project area, which has been subject to intense boat mooring and related activities. (Id.) Herman supported the limitations on the number of piers as proposed by Bartz.

9. Robert Morris testified that he believes that boat moorings at the property exceeded pier guidance, detracted from natural scenic beauty and jeopardized public safety. Morris, a professional land-use consultant (Ex. 63), provided expert testimony that he believed the existing moorings should be treated as a "boat shelter" within the meaning of NR326.03(1) Wis. Admin. Code. However, DNR staff were persuasive that the pier slips should, rather, be treated as "piers" within the meaning of Sec. NR326.03(7) Wis. Admin. Code. Common sense supports the DNR position. The basic purpose of the subject piers is the "mooring" of boats and not the provision of "cover" as stated in the definition of a boat shelter as set forth in the administrative code.

The ALJ was also not convinced that a ban on overnight moorings in the public-use slips is necessary to protect the public interest in navigable waters. However, Morris was convincing that the pipes and posts in the water constitute a safety hazard, particularly to snowmobilers in winter.

10. The existing configuration of piers are densely packed along the shoreline and detract from natural scenic beauty. (Bartz, Morris) Placement of piers as set forth in the permit will mitigate these detrimental impacts to the public interest in natural scenic beauty.

11. Based upon the record as a whole, the following conditions are necessary to protect the public interest on navigable waters:

A. No more that 26 boats shall be moored at the project site, if the applicant makes seven slips available to the public for seasonal rental. If the

applicant chooses not to make slips available to the public, but decides to make all slips available for campground users, no more than 24 boat slips shall be placed.

B. All watercraft shall be moored between the boat landing and beach or piers 1 through 14 as identified on Ex. 1-A. Piers 15 through 28 shall be removed, as these piers contribute to upland erosion along the point and create navigational hazards. (Bartz)

C. Piers shall be removed or fenced in winter months to prevent injury to snowmobilers.

D. All pipes, tires and other man-made objects attached to pier structures shall be removed.

12. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

13. The proposed structures will not reduce the effective flood flow capacity of Lake Alice upon compliance with the conditions in the permit.

14. The proposed structures will not adversely affect water quality nor will it increase water pollution in Lake Alice. The structures will not cause environmental pollution as defined in sec. 281.01(10), Stats., if the structures are built and maintained in accordance with this permit.

15. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

2. The applicants are riparian owners within the meaning of sec. 30.12, Stats.

3. The proposed facility described in the Findings of Fact constitute structures within the meaning of sec. 30.12, Stats.

4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

5. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. Muench v. PSC, 261

Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation and scenic beauty. WED, Inc. v. DNR, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978). The proposed project would be detrimental to the public interest in maintaining fish spawning habitat and aquatic plants.

6. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats., on the ground that they impair natural beauty. This is a proper basis for denial of a permit. Claflin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would not be detrimental to the public interest in natural scenic beauty, so long as the permit conditions are followed.

7. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried its burden of showing that the proposed project would be not detrimental to the public interest in navigable waters.

8. The DNR must consider the "cumulative impact" of many small pier slip projects on a lake as a whole in carrying out its legislatively assigned duty in protecting the navigable waters of the state. Sterlingworth Condominium Assoc. v. DNR, 205 Wis. 2d 710, 721-722, 556 N.W.2d 791 (Wis. Ct. App. 1996). Accord: Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966).

9. The rights of a riparian must be balanced with the public rights in the navigable waters of the state. A riparian's use of a riparian property must be "reasonable." The reasonable use of a riparian property is related to factors specific to pier placement, including the amount of riparian frontage and the historic use of the property. Sterlingworth, Id., p. 731.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30.12, Stats., for the construction of structures as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structures become a material obstruction to navigation or becomes detrimental to the public interest.

2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.

3. A copy of this permit shall be kept at the site at all times during the construction of the structures.

4. The permit granted herein shall expire three years from the date of this decision, if the structures are not completed before then.

5. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

6. Any area disturbed during construction or removal shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.

7. No more than 26 boats shall be moored at the project site, if the applicant makes seven slips available to the public for seasonal rental. If the applicant chooses not to make slips available to the public, but decides to make all slips exclusively available for campground users, no more than 24 boat slips shall be placed. The permittees shall advise the DNR Area Water Management Specialists of its preference in this regard within 10 days of this decision becoming final.

8. All watercraft shall be moored between the boat landing and beach or piers 1 through 14 as identified on Ex. 1-A. Piers 15 through 28 shall be removed.

9. Piers shall be removed or fenced in winter months to prevent injury to snowmobilers.

10. All pipes, tires and other man-made objects attached to pier structures shall be removed.

11. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on October 13, 1998.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 267-2744

By


JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.